Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	**CS Docket No. 97-151**
Of the Telecommunications Act	)	
Of 1996	)	
	)	
Amendments of the Commission's Rules	)	
And Policies Governing Pole Attachments	)	

To the Commission:

JOINT REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

David L. Swanson
Edison Electric Institute
701 Pennsylvania Avenue
Washington, D.C. 20004
(202) 508-5000

Jeffrey L. Sheldon
Sean A. Stokes
UTC
1140 Connecticut Avenue
Suite 1140
Washington, D.C. 20036
(202) 872-0030

Dated: October 21, 1997

TABLE OF CONTENTS

SUMMARY

As the FCC moves forward to implement the new pole attachment rate provisions contained in Section 224(e) the electric utility industry urges the FCC to adopt a flexible approach that encourages the use of good faith negotiations and market forces. In instances where the parties fail to reach an agreement the FCC should utilize a forward–looking pricing methodology that accurately reflects the costs of capital.

A fundamental goal of Congress in amending the Act to create new Section 224(e) was to eliminate the regulatory disparity caused by the *Texas Utilities* case. Under the revised Act cable television companies are not entitled to the cable-only incremental rate formula for non-cable services, including internet. To allow otherwise would provide a windfall for cable operators at the expense of utilities and competing non-cable-affiliated telecommunications carriers.

Contrary to the claims of some attaching entities, administrative, operational, safety and equity considerations all dictate that entities may not overlash existing attachments without first notifying and obtaining permission from the pole owner. Each entity subject to an attachment fee as a result of overlashing should also be counted as an attaching entity for purposes of determining the allocation of the non-usable space on a pole. The provision of dark fiber from within an existing attachment does not constitute a new attachment under the Act.

The 40-inch safety space emanates from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles. If not assigned as usable space to cable and telecommunications companies, EEI and UTC reiterate that, at a minimum, the safety space should be considered as "other than usable space" and be apportioned equally among all of the attaching entities.

The Act requires that the common "non-usable" space on a pole be apportioned among all attaching entities. EEI and UTC support the FCC's recommendation that each utility develop, through the information it possesses, a presumptive average number of attachers on its poles. In determining this presumption the majority of commenters agree with EEI and UTC that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide "telecommunications services," and therefore does not include electric utility attachments that are used to provide electricity. Nor does the Act apply to non-telecommunication service attachments by governmental entities. Finally, because ILECs are not "attaching entities" under the statute, EEI and UTC continue to maintain that it is appropriate that ILECs also not be counted in the two-thirds apportionment.

Despite the efforts of EEI and UTC, as well other utility representatives, to educate the participants in the on-going attachment proceedings to the inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits, there continue to be efforts on the part of some attaching entities to treat all conduit the same. The FCC must not be misled by these commenters. Electric conduits have very different, specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224. Given the operational requirements of electrical systems use of conduits, the FCC's proposed half-duct methodology is wholly inappropriate for the pricing of access to electric utility conduit. Further, any calculation of a just and reasonable conduit rate must be based on a conduit system including ducts, conduit, cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities. EEI and UTC renew their recommendation that rates for the use of right-of-way which the utility owns in fee should be based on a negotiated amount or on the eminent domain compensation standard used in the particular state if negotiations fail.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	**CS Docket No. 97-151**
Of the Telecommunications Act	)	
Of 1996	)	
	)	
Amendments of the Commission's Rules	)	
And Policies Governing Pole Attachments	)	

To the Commission:

JOINT REPLY COMMENTS OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.415 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, The Telecommunications Association,[1] hereby respectfully submit the following reply comments on the FCC's *Notice of Proposed Rulemaking* (*NPRM*), FCC 97-234, released August 12, 1997, in the above-captioned matter regarding the adoption of final rates, terms and conditions governing pole attachments.[2]

As the principal representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act, 47 U.S.C. Section 224, as amended by the Telecommunications Act of 1996, EEI and UTC provided comments on the FCC's initial proposals. The Joint EEI and UTC comments focused on the need to adopt rules that: (1) exhibit a preference for negotiated agreements; (2) approximate market costs; (3) and recognize the legitimate operational and administrative requirements of utilities. Below, EEI and

[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] By Public Notice released October 10, 1997, the Cable Bureau extended the date for reply comments to October 21, 1997, DA No. 97-2173.

UTC again address these issues in the context of the comments submitted by other parties to this proceeding.

I. LIMITED SCOPE OF THE FCC'S AUTHORITY

The Commission has adopted the current *NPRM* to implement the provisions contained in new Section 224(e), which directs the FCC to prescribe regulations to govern charges for attachments to utility poles, ducts, conduits and rights-of-way by telecommunications companies when the parties fail to resolve a dispute over such charges. In implementing these provisions EEI and UTC reiterate that the FCC must not adopt an overly-broad interpretation of its authority that goes beyond the intent of Congress and the clear statutory language of the Act. Pursuant to the intent of Congress and in order to balance the competing interests of all parties, the FCC should adopt a flexible approach that relies to the greatest extent possible on the use of market forces to establish the rates, terms and conditions of pole attachment agreements.

In addition, as demonstrated by the Joint EEI and UTC Comments, the issue of telecommunications attachments to utility transmission towers or wireless attachments in general are outside the scope of the current *NPRM* and the FCC's authority. Apart from the fundamental issue of whether the FCC has the authority to regulate access to utility transmission structures or wireless attachments,[3] it must be recognized that the proposed rate formulas for pole attachments and conduits do not even attempt to account for the far greater costs and operational/reliability considerations associated with attachments to transmission towers or for wireless attachments. As ICG acknowledges, attachments on top of utility transmission towers raise unique safety and maintenance issues that may require an exemption from Section 224.[4] Accordingly, the request

[3] EEI and UTC currently have a petition for reconsideration regarding this issue pending in the FCC's interconnection proceeding, CC Docket No. 96-98.

[4] ICG, p. 49. Note, that ICG's statement concerning the feasibility of burying fiber along utility transmission right-

by AT&T, MCI and Omnipoint for the FCC to establish a transmission tower formula and wireless attachment formula in the context of this rulemaking are wholly inappropriate.

II. THE COMMENTS EVIDENCE A STRONG PREFERENCE FOR NEGOTIATED AGREEMENTS

A number of the commenters indicated support for the use of arms-length negotiations between attaching parties and pole owners as the principal means of establishing the terms and conditions of pole attachments. As indicated by the comments of American Electric Power,[5] the plain language of Section 224(e)(1) and the accompanying Conference Committee Report evidence the clear intent of Congress that voluntary negotiations must be the fundamental means for setting the rates for telecommunications carrier attachments to utility poles, ducts, conduits and rights-of-way.[6]

Consistent with the Commission's recommendation that negotiations be the primary means of establishing pole attachment agreements the FCC must not adopt the recommendations of some attaching entities that would merely pay "lip service" to the use of negotiations. For example, the FCC should reject the recommendation of ICG that equates "good faith" negotiations with the use of a mandatory "most favored nations" clause under which a utility would not be able to differentiate in the rates, terms and conditions that it negotiates with individual carriers.[7] ICG's recommendation would effectively thwart the negotiation process envisioned by Congress. The use of negotiations necessarily requires some differentiation in the terms and conditions depending on what the parties specifically negotiate.

---

of-way is a separate and distinct issue from access to utility transmission towers.

[5] American Electric power, Commonwealth Edison, Duke Energy and Florida Power and Light (collectively filing as "American Electric Power"), p. 12.

[6] Conference Report to the Telecommunications Act of 1996, S.652, 104th Congress, 2nd Sess., p.70.

[7] ICG, p.16. ICG's comment that telecommunications carriers should be allowed to bypass negotiations and attach to a pole without an agreement evidences the fact that some attaching entities have no real commitment to engage in negotiations. Attachment absent a valid agreement is trespass.

As indicated in the joint comments of EEI and UTC, the FCC's action on this point should be informed by the Eighth Circuit's recent decision striking down an FCC interpretation of an analogous non-discrimination provision in its *First Report and Order* in the interconnection proceeding, CC Docket 96-98. In *Iowa Utilities Board v. FCC,* the court held that it was not reasonable for the FCC to interpret this term as requiring "most favored nation" treatment among all parties with no variance. The court held that such an interpretation conflicts with the Act's design to promote negotiated binding agreements. Consistent with this holding, the Commission should explicitly recognize that the Section 224(f) non-discriminatory access provision does not require that the rates, terms and conditions of pole attachment agreements between a utility and all attaching entities be identical, but instead allows for a range of acceptable rates and conditions depending on what the parties freely negotiate.

Similarly, the FCC should reject ICG's request to "decouple" rate negotiations from access negotiations.[8] Such an approach would completely ignore the fact that a variety of rights and conditions are contained within a pole attachment agreement that are not necessarily severable. For example, specific terms may not be reasonable or feasible to separate from the context of the entire "package" of terms and conditions that the parties might negotiate prior to attachment.

Further as American Electric Power notes, an attaching entity has little incentive to reach and be bound by an agreement regarding the terms and conditions for making a pole attachment when the attaching entity knows it can readily turn to the FCC through the complaint process to contest individual terms it has agreed to in order to obtain more favorable terms.[9] In order to

[8] ICG, p. 10.

[9] American Electric Power, p. 18.

eliminate this disincentive for meaningful negotiations the FCC must make clear that absent fraud, duress, or misrepresentation, once an agreement is mutually reached between the two entities it should be binding and attaching parties should not have the right to use the FCC to improve or eliminate terms or conditions that they freely negotiated.

A number of commenters support the FCC's recommendation that an attaching entity must attempt to negotiate and resolve its dispute with a utility before filing a complaint with the Commission. However, EEI and UTC agree with the United States Telephone Association (USTA) that the FCC's proposal to extend the present requirement for complainants to first file a brief summary of the steps taken to resolve the dispute does little to encourage good faith efforts on the part of attaching entities. As USTA notes, the summary often functions only as a filing formality, rather than as a catalogue of the genuine efforts undertaken to reach a negotiated agreement.[10] Consistent with this point Carolina Power & Light echoes the comments of EEI and UTC that the FCC needs to adopt a mechanism for determining what constitutes "good faith" negotiations.[11] Carolina Power & Light provides examples of the types of abuses that are endemic under the current complaint process under which cable operators are free to make naked assertions or misrepresentations regarding negotiations with little impunity.[12]

In order to give meaning to the requirement that the parties first attempt to negotiate, EEI and UTC renew their recommendation that the FCC amend the current rule, which requires a complainant to include a brief summary of all steps taken to resolve its dispute before filing a

---

[10] USTA, p. 2.

[11] Carolina Power & Light, Delmarva Power & Light, Atlantic City Electric, Entergy Services, Florida Power, Pacific Gas & Electric, Potomac Electric, Public Service of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric, and Virginia Power (collectively known as "Carolina Power & Light").

[12] Carolina Power & Light, p. 18.

complaint, by specifically adding a requirement that the parties attempt to negotiate for a certain minimum period of time as evidence of good faith before a party can file a complaint. EEI and UTC recommend that 180 days would be an appropriate minimum period of time. Carolina Power & Light, Duquesne Light Company, Ohio Edison, and Union Electric support this period of time. In addition, the complainant should be required to document its attempts to negotiate, including listings of meetings, correspondence, offers and counter-offers, etc. Finally, the FCC should adopt USTA's recommendation that aggrieved attachers be required to file a thirty-day Notice of Intent with the pole owner alerting the owner as to every issue contained in the complaint.[13]

III. THE FCC SHOULD UTILIZE FORWARD LOOKING PRICING

EEI and UTC agree with Carolina Power & Light that the FCC has broad latitude to establish just and reasonable rates under Section 224(e). Unlike the constraints of Section 224(d) which prescribes a rate between marginal cost and fully-allocated cost, new Section 224(e) does not impose any specific maximum rental rate for telecommunications attachments. That is one reason why the rate is to be phased-in over five years. Accordingly, and given the Act's preference for the use of market forces and negotiations as the primary means to establish attachment rates, the use of forward-looking replacement costs is reasonable and entirely appropriate in the FCC's formulation of a pricing "backstop" to be used when the parties are unable to negotiate an agreement.

Forward looking pricing, which reflects economic capital costs, should be used as a surrogate for a market rate because it most effectively approximates the real cost of access to utility facilities. As American Electric Power indicates, meaningful negotiation can only occur

[13] USTA, p. 2.

when the default pricing is close to what the parties would have negotiated under market conditions, otherwise the attaching party will have no incentive to actually negotiate.[14] The fact that Congress specifically adopted a fully-allocated cost formula that looks to the value of the entire pole reinforces the use of forward looking pricing as it ensures that the pole, duct or conduit owner is provided full compensation for the use of its facilities. Moreover, the market rate applies to all non-utility property utilized by telecom providers.

Carolina Power & Light correctly observes that the use of forward looking pricing would allow the presumptive rate to be at or near replacement cost, as the combination of a competitive market, mandatory access and cost-apportionment, will ensure that no more (and usually much less) than full replacement cost will be charged to an attaching entity.[15] It must be recognized that the pricing methodology will only establish pole costs that must then be apportioned among attaching entities and in all instances under the formula a utility will be paying at least one third of the non-usable space cost plus its portion of the usable space.

Finally, as indicated by EEI and UTC in their comments, forward looking pricing has been embraced by the FCC as the proper methodology for determining the pricing of access to local telephone facilities in its interconnection proceeding, CC Docket No. 96-98, and the Commission has specifically indicated its intent to use forward looking pricing for the determination of pole and conduit costs in the universal service context.[16] It makes little sense to utilize forward-looking pricing for valuing assets owned by telephone companies which are directly competing against attaching entities and yet not apply it to utilities that are in a completely separate line of business.

---

[14] American Electric Power, p. 12.

[15] Carolina Power & Light, p. 15.

[16] *Further Notice of Proposed Rulemaking*, Forward-Looking Mechanism for High Cost Support for Non-Rural

IV. OVERLASHING AND ATTACHMENT SPACE USE

A. Comments Support The Statutory Requirement That The Provision of Any Service Other Than Cable Television Takes A Cable Company Outside the Realm Of Section 224(d)

A number of commenters join EEI and UTC in reminding the Commission that the *Texas Utilities*[17] case took place in a pre-Telecommunications Act environment that is no longer applicable.[18] As USTA correctly observes, the statutory language of Section 224 makes it clear that the pre-1996 Act formula will continue to apply only to pole attachments used solely to provide cable services.[19] Thus, the use of a cable company's pole attachments to support equipment employed to provide non-video services in addition to video would not be used solely to provide cable services and would, at a minimum, trigger the new fully-allocated cost formula of section 224(e).

While the cable industry appears to facially concede this point, their comments nevertheless evidence an effort to extend the cable-only incremental rate to services beyond cable service. For example, Comcast and the National Cable Television Association (NCTA) both attempt to argue that while Congress intended to allow utility pole owners to charge a higher rate for poles used for the provision of telecommunications services, it did not intend that such rate would apply to internet services provided over a cable television system.[20] In order to make this

---

LECs, CC Docket No. 96-45, released July 18, 1997, para. 104.

[17] See *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099 (1991), recon. denied, 7 FCC Rcd. 4192, aff'd sub nom. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

[18] Ameritech, American Electric Power, GTE, ICG, Ohio Edison, MCI, SBC, Texas Utilities, Union Electric and USTA.

[19] USTA, p. 4.

[20] Comcast, p. 18; and NCTA, p. 4.

argument the cable industry suggests that internet services provided over a cable system are "cable services" as defined under Section 602 of the Act. [21]

Even for cable television this argument does not pass the laugh test. Section 602(6) states that the Term "cable service" means –

> (A) the one-way transmission of (i) video *programming*, or (ii) other *programming* service, and
> (B) subscriber interaction, if any, which is required for the selection or use of such video *programming* or other *programming* service[22]

The definition of "cable service" contained in the Act is clearly limited to traditional video services and other "programming services" and does not include internet services. The FCC's Office of Plans and Policies' white paper "Digital Tornado: Internet and Telecommunications Policy indicated that internet while capable of being distributed by cable operators did not fit neatly into the Act's definition of cable services.

Aside from its inconsistency with the plain meaning of the Act, the cable television industry's arguments undermine the intent of Congress to create regulatory parity. Section 224 was amended to create a separate rate for telecommunications attachments by cable companies and other telecommunications service providers in order to close the loophole created by the *Texas Utilities* case by which cable television companies could get a competitive advantage over other, non-cable affiliated telecommunications carriers. Cable television companies should not be allowed to re-open this loophole to provide internet services pursuant to a regulated cable-only rate. Such an outcome would require utility customers and shareholders to further subsidize non-cable services and would place non-cable affiliated internet providers at a competitive disadvantage.

---

[21] Presumably under this line of argument cable operators will now include internet revenues in their calculation of the gross revenues percentage that they are required to pay franchise authorities.

A cable operator is only entitled to the Section 224(d) rate if it is utilizing its pole attachment solely to provide cable television service. A number of commenters agree with EEI and UTC that to qualify for this rate a cable company should be required to certify that its pole attachments are not used, by the cable operator or others, to provide any service other than cable television service. The cable company must be required to notify the utility as soon as it or others commence to offer services other than cable television. It is appropriate to impose this requirement on the cable company because it is practically impossible for a utility to know what a cable company is actually doing with its attachments. EEI and UTC agree with American Electric Power that the certification should be on a community-by-community basis.[23]

NCTA and others attempt to argue that because some cable operators have begun to utilize an integrated design, in which video, telecommunications, and other signals are physically propagated throughout a subscriber network, cable operators should not be required to pay the higher rate for all poles that carry non-cable-only transmissions but instead should only pay the higher rate for only that proportion of poles that are assumed to be used to provide non-cable services to specific customers. NCTA suggests that poles should be presumed to be used for telecommunications in proportion to the number of subscribers in a system who subscribe to telecommunications services over the cable system.[24]

NCTA's argument is unpersuasive. Under new Section 224(d)(3) a cable television operator is only entitled to the lower rate if the attachment is used solely to provide cable services.[25] It does not make a difference under the statute what the structural design of the

---

[22] Section 602(6) (*emphasis* added).

[23] American Electric Power, p. 30.

[24] NCTA, pp. 23-24.

[25] In fact, it could be argued that once any pole within a given cable system is utilized for non-cable services than all of the poles in the system should be subject to the higher telecommunications rate. Such an interpretation would be

system is. If the pole is being used for non-cable services it falls outside of the cable-only rate. Contrary to the claims of cable operators such an outcome does not impose any greater burden on cable operators than any other telecommunications carriers. Moreover, it more accurately compensates pole owners for the use of their facilities. Finally, NCTA's proposed calculation based on number of subscribers to the cable company's telecommunications service would require utility attachment fees to be based upon the success of the cable company's telecommunications marketing rather than its actual use of the poles.

In order to create an incentive for the cable company to provide accurate and timely notice to the utility, EEI and UTC reiterate that starting on February 8, 2001, the rules must allow a utility to immediately begin to charge the higher telecommunications rate for the entire cable system and impose penalties for false certification by a cable operator.

B. Overlashing Requires a Separate Agreement

The comments indicate a fundamental disagreement between pole owners and attaching entities regarding the rights and responsibilities surrounding the issue of overlashing. Bolstered by the FCC's tentative conclusion that telecommunications carriers should be permitted to overlash their existing lines with additional fiber, several competing carriers suggest that overlashing is a right to which they are entitled as attaching entities. For example, Comcast suggests that the FCC adopt a rule that would routinely allow overlashing without advance permitting or prior notification to the utility pole owner, and that there should be no additional charges for overlashing.

---

consistent with the FCC's prior interpretation that once a utility allows an attachment on any pole than all poles are subject to the Act.

In contrast, the majority of pole owners, and even some attaching entities, recognize that overlashing has serious physical impacts, constitutes a separate attachment, and must necessarily be coordinated with the pole owner. EEI and UTC absolutely agree with USTA that the pole owner alone has the authority to permit overlashing. Absent the grant of specific authority to overlash in the existing pole attachment agreement all parties seeking to overlash existing facilities must be required to notify the utility and enter into a new/revised pole attachment agreement. As USTA notes, all pole owners have obligations related to system reliability and public safety that necessitate a reasonable level of control to ensure that access demands and pole load capacities are in concert with one another.[26] Moreover, as was recognized by Congress in adopting Section 224(f)(2), electric utilities as providers of an inherently dangerous yet absolutely essential service have a fundamental requirement to maintain control over their facilities. Further, utilities must have the ability to contract with and identify overlashing parties regarding such issues as liability, indemnification, and notification during emergencies or routine rearrangements. After all, even telecommunications providers depend on the continuing reliability of both the utility plant and electric service.

Despite the claims by some parties that overlashing does not entail any additional burden on the pole,[27] simple physics dictates that the overlashing of a horizontal cable with a new wire must necessarily add to the weight borne by the pole, as well as to the overall surface area on which ice and wind can accumulate and add strain to the pole. ICG a competitive local exchange carrier acknowledges that overlashing places additional strain on poles and therefore overlashing

[26] USTA, p. 6.

[27] Comcast, p. 3, and others essentially argue that overlashed fiber is so light and "wafer thin" that it could not possibly impact the pole.

requires appropriate analysis and make-ready to prevent safety and other harms.[28] Moreover, some commenters indicate that overlashing in some instances can harm the overlashed cables. For example, MCI notes that the coaxial cable (frequently overlashed by cable companies) is less resistant to stress than fiber and may also be strung without a guy wire or support strand making it even more vulnerable to breakage as a result of overlashing.[29] In addition, Comcast's use of its "wafer thin" argument fails to consider the cumulative effect on the poles of multiple attachments and overlashing.[30]

Notwithstanding the efforts of cable companies to portray utilities as anti-competitive it is important to recognize that most electric utilities are indifferent to telecommunications competition. Electric utility telecommunications subsidiaries would be subject to the same requirements. Utility requirements with regard to overlashing are entirely reasonable, and will not significantly impede or delay construction of telecommunications networks. The requirements can be summarized as follows: (1) utilities must have prior knowledge that an overlashed attachment is being made through a permitting process; (2) an engineering analysis must be completed at the expense of the overlasher in order to determine the overall impact of the overlash; (3) and if it is found that the overlashing places additional strain on the pole requiring stronger anchors and other make–ready work, that too must be paid for by the overlashing entity.

EEI and UTC support American Electric Power's contention that overlashers should pay a separate attachment fee,[31]and disagree with AT&T's assertion that attachers should be free to

---

[28] ICG, pp. 19-20.

[29] MCI, p. 11

[30] MCI projects a grim picture of the future with as many as 42 attachments on a pole comprised of 36 separate overlashings, p. 9.

[31] American Electric Power, p. 46.

contract with third parties who want to overlash to the attacher's cables without additional payment to or authorization from the pole-owner. A third-party who overlashes an existing attachment must be required to pay the full attachment rate to the utility because the overlashing party benefits from the existence of the pole in the same manner as any other attaching entity. As EEI and UTC noted in their comments, it must be borne in mind that all regulated pole attachments carry implicit subsidies by utility customers and shareholders to cable and telecommunications companies and these companies should not be able to avoid their minimum contributions to recovery of costs incurred by utilities and their consumers for the benefit of attachers. Further, cable and telecommunications companies should not be able to achieve a windfall at the expense of utility customers and shareholders by marketing their subsidized attachment rates to other telecommunications entities at market rates.

In addition as noted by American Electric Power, neither pole owners nor the FCC have any ability to require attaching entities to allow overlashing by third parties.[32] Therefore, if overlashing is not treated in a manner that is consistent with other attachments it could give rise to anticompetitive behavior on the part of entities with existing attachments at the expense of non-affiliated competitors.

Each entity subject to an attachment fee as a result of overlashing should be counted as a separate attaching entity for purposes of determining the allocation of the non-usable space on a pole. A common space charge would recognize that the overlashed cable puts an additional strain on the entire pole, thereby reducing the number of possible attachments to that pole. Moreover, an overlashment obtains all of the benefits of attaching that accrue to every other attachment.

---

[32] American Electric Power, p. 48.

C. Loading Capacity of Attachments Must Be Analyzed

In the *NPRM* the FCC sought comment on an issue raised by Duquesne Light Company, which advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden, and therefore the costs, relating to the attachment. EEI and UTC supported Duquesne's contention that varying attachments place different burdens on the pole and therefore if a utility is able to track such factors it should be able to include factors addressing weight and wind loads into its calculations. In particular, EEI and UTC supported the ability of utilities to factor in the impact that the use of tightly pulled fiber optics and the practice of overlashing have had on the amount of space that is required by cable companies and other attaching entities.[33]

AT&T opposed this recommendation arguing that electric utility equipment imposes a much greater burden on the pole.[34] This argument is flawed in two respects. First of all the utilities as pole owners specifically design the pole to meet their electrical attachment requirements, and re-engineer the pole if they make modifications to these facilities. Therefore, they bear all of the related costs. Second and more importantly, electric utility equipment that is not related to the pole is already subtracted from the cost of the bare pole that is used to calculate the rate, particularly due to the FERC accounts in which these costs are recorded.

D. Use of Dark Fiber Within Existing Lines

In response to the FCC's inquiry whether a cable system or telecommunications carrier may allow a third party to use dark fiber in its original lines or overlashed lines, EEI and UTC

[33] Section 224(e)(3) provides that the rate component for usable space is to be based on the amount of space "required" by the attaching entity, rather than the space occupied.

agree with the majority of commenters that such activity does not constitute a new attachment under the Act. As Texas Utilities makes clear, nowhere in the text of Section 224 or in the legislative history of the statute is there any indication that Congress intended for regulated attachment rates to apply to attachments used to provide dark fiber.[35] The Act only concerns attachments used for the provision of "cable television service" and "telecommunications services" based on the statutory definition of these terms dark fiber does not constitute either one of these services.

V. COMMENTS CONFIRM THAT SAFETY SPACE SHOULD BE ASSIGNED TO ATTACHING ENTITIES' USABLE SPACE OR TO NON-USABLE SPACE

The majority of commenters reject the FCC's tentative conclusion that the 40-inch safety space should be assigned to the utility as part of its usable space.[36] These commenters are of the position that the safety space should properly be assigned to either the usable space of the attaching cable and telecommunications companies or to all entities as part of the non-usable space on the pole. As EEI and UTC indicated in their comments, the safety space emanates from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles, therefore it makes little sense to perpetuate the assignment of this expense to electric utilities.

The only argument that is put forward to support the FCC's proposal is that this is the way it has always been done in the past. For example, NCTA admits that the safety space "is necessary to protect non-utility employees" but argues that the FCC has assigned this space to

---

[34] AT&T, p. 8.

[35] Texas Utilities, p. 4.

[36] Consolidated Edison, Carolina Power & Light; Dayton Power and Light; Duquesne Light Company; GTE; ICG; American Electric Power; Ohio Edison; SBC; and Union Electric.

utilities in the past and should continue to do so.[37] NCTA's minimal and unsupported argument is unconvincing. Cable companies and the FCC can no longer retreat behind the questionable logic of the past assignment of the safety space, which relied on ambiguous statutory language and vague legislative history. Unlike the prior requirement that looked to the space "occupied" by the cable attachment, new section 224(e)(3) looks at the space actually "required" by the attaching entity. While cable and telecommunications companies may not physically "occupy" the 40-inch safety space their attachments require it.[38] In contrast, electric utilities already have a safety space between their primary cables and their secondary cables that is allocated to their usable space. Electric utilities do not require any additional space.

As GTE notes, there are important safety issues surrounding electrical pole attachments; the 40-inch safety space mandated by the NESC is designed to benefit all attaching parties by protecting their workers from the risks of contacting electrical attachments. The mandatory nature of the safety space means that for all practical purposes the space is unusable. It is at least unusable for attaching horizontal spans of cable. This safety obligation benefits all attaching parties.[39]

EEI and UTC reiterate their recommendation that if the FCC does not assign the safety space to the usable space of cable and telecommunications companies, it should at a minimum, consider it as "other than usable space" and be apportioned equally among all of the attaching entities. Such an approach recognizes that the safety space benefits all users of the pole – attaching entities and owners alike. Since the space would add to the total amount of non-

---

[37] NCTA, p. 16.

[38] The 40-inch safety space also helps to reduce the operating costs of telecommunications providers since they do not need to pay the higher costs of hiring electrically qualified workers.

[39] GTE, p. 10.

usable space its costs would still be borne in part by the utility due to its statutory allotment of 1/3 of the non-usable pole costs.

VI. ALLOCATION OF OTHER THAN USABLE SPACE

A. Only "Attaching Entities" Should Be Counted When Allocating Non-Usable Space

A number of commenters agree with EEI and UTC that in implementing the 224(e)(2) requirement of an equal apportionment of two-thirds of the costs of providing non-usable space among all "attaching entities" the FCC must look to the statutory language to determine what entities actually constitute "attaching entities" for this apportionment. For example, there is consensus of agreement among the commenters that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide "telecommunications services," and therefore does not include electric utility attachments that are used to provide electricity. [40]

The strained arguments of AT&T and others that the FCC should contort the language of the Act to cobble together an interpretation that allows as many users of the pole as possible to be counted as attaching entities simply in order to lower the rate cannot be supported. Moreover, that is completely outside of the FCC's authority. Under the Act the rate impact is irrelevant. The FCC should not adopt the entirely fallacious argument that the rate formula is supposed to result in an equal rate for all entities that utilize the pole. That is completely wrong. The amended provisions of Section 224 clearly contemplate some (perhaps even great) disparity in rates by different users of the pole. For example, cable companies are specifically provided a

[40] MCI, among others, makes the reasonable argument that because 224(e) only applies to attachments used for telecommunications services, attachments by cable companies to provide cable television service should not be

lower subsidized rate than other attaching entities. Moreover, the Act's five year delay for implementation of the new rate plus the five year phase-in demonstrate a recognition on the part of Congress that the rate for telecommunications service providers will almost certainly increase. However, as the rate for individual attachers is likely to remain substantially below a full market price this increase can only be viewed as significant in comparison to the greatly subsidized rate that attachers will receive until 2001.

B. Utility Telecommunications Service Attachments Should Be Counted For Purposes of Allocating Costs of Non-Usable Space

EEI and UTC agree with American Electric Power's conclusion that the Act requires a utility or its subsidiary to be counted as an attaching entity for purposes of apportioning non-usable space if it has attachments that are used to provide telecommunications services.[41] However, EEI and UTC renew their request that the FCC clarify that this requirement would not apply to utility communications attachments that are not used to offer "telecommunications services" as defined in the Act. For example, utility attachments for private internal communications should not be counted as part of the apportionment of the costs of the non-usable space. Such communications systems are an integral part of providing reliable and safe electricity to the public. In addition, the lease of dark fiber from within internal utility networks should not be considered a telecommunications attachment because it does not constitute the provision of "telecommunications service" under the Act.

C. ILECs Should Not Be Counted As Attaching Entities

Several attaching entities attempt to craft a policy argument to count ILECs as attaching entities for the purposes of apportionment of the costs of non-usable space. For example,

---

counted for the apportionment of non-usable space, p.14.

[41] American Electric Power, p. 40.

Comcast argues that the exclusion of ILECs from the statutory definition of telecommunications carriers was for the limited purpose of preserving private contracts between electric utilities and ILECs.[42]

The flaw in this argument is that it requires the FCC to ignore the plain meaning of the statutory language. The new rate under Section 224(e) clearly applies to "telecommunications carriers" who use pole attachments to provide telecommunications services, and 224(a)(5) explicitly states that ILECs are not considered "telecommunications carriers" for pole attachment purposes. Given the literal terms of the Act, and the absence of Congressional intent to indicate otherwise, it would be appropriate and reasonable for a utility to exclude ILEC attachments in determining the number of attaching entities.[43] Such an interpretation is also bolstered by the fact that as utility pole owners ILECs are already required to pay 1/3 of the costs of the non-usable space on their own poles.

D. The Amount of Usable Space Required By An Attaching Entity Does Not Impact The Apportionment of The Non-Usable Space

The commenters uniformly oppose the FCC's suggestion that a telecommunications carrier should be counted as a separate attaching entity for each foot, or partial increment of a foot; it occupies on the pole. For example Carolina Power & Light indicates, that no reasonable construction of the statute supports the conclusion that a new "entity" is created by each attachment or each increment of usable space occupied.[44] The Act clearly and specifically calls for an allocation of 2/3 of the cost of non-usable space equally among all "attaching entities." By allocating costs on the basis of occupied space, the FCC's proposal would make the allocation of

[42] Comcast, p. 6.

[43] EEI and UTC continue to note that as with any rate, term or condition that is subject to negotiations, it would not be unreasonable for a utility to include an ILEC as a separate attaching entity in apportioning the cost of the non-usable space on a pole.